

considered as evidence in this proceeding. Therefore, the issues now before the Appeals Board on this review are:

- (1) Whether the deposition of P. Brent Koprivica, M.D., should be included as part of the evidentiary record in this proceeding.
- (2) The nature and extent of claimant's injury and disability, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Administrative Law Judge should be modified.

(1) Deposition of Dr. Koprivica.

The deposition of P. Brent Koprivica, M.D., should be considered as part of the evidence in this proceeding.

Because claimant allegedly failed to forward respondent a copy of answers to written interrogatories dated September 6, 1994 that claimant prepared for use in his social security claim, respondent contends the provisions of K.S.A. 44-515 should be invoked to exclude the doctor's testimony. Respondent acknowledges it received a copy of Dr. Koprivica's report dated August 31, 1994 that detailed the results of an examination and evaluation of claimant conducted on that date. Claimant contends he forwarded a copy of the interrogatories and answers to the respondent when he forwarded Dr. Koprivica's August 31, 1994 medical report. Although the record is unclear, Dr. Koprivica may have also issued an addendum report which respondent contends it also did not receive.

The Appeals Board finds that claimant inadvertently failed to provide the respondent with copies of Dr. Koprivica's answers to written interrogatories and any addendum report which may exist. However, the Appeals Board also finds that respondent has not shown unfair surprise or prejudice, which is necessary to exclude the doctor's testimony. It appears the only significant information contained in the answers to interrogatories and/or addendum report that the August 31, 1994 medical report did not contain is the doctor's affirmative statement that claimant was totally disabled. However, claimant's cover letter to the respondent's attorney dated September 15, 1994, which was introduced at Dr. Koprivica's deposition, indicates that Dr. Koprivica believed claimant was "permanently and fully disabled." Therefore, respondent was placed on notice of Dr. Koprivica's opinion regarding claimant's abilities to perform substantial and gainful employment. In the absence of unfair surprise or prejudice directly caused by the failure in providing a medical report, the testimony of the physician should be permitted. Such is the intention of the Workers Compensation Act. Also, the Appeals Board finds that the answers to interrogatories prepared for a social security disability claim do not constitute a medical report as contemplated by K.S.A. 44-515.

(2) Nature and extent of injury and disability.

On October 11, 1993 claimant sustained electrical shock when the boring machine he was operating while working for the respondent struck a power line. The electrical shock rendered claimant unconscious. The respondent agrees that the incident occurred.

However, the issue to be decided is the nature and extent of the resulting injury and disability, if any.

As a result of that accident, claimant has seen numerous physicians for treatment and evaluation. Immediately following the incident, claimant was taken to the emergency room at Shawnee Mission Medical Center and evaluated for heart damage. After a short period of evaluation, he was released and ultimately referred to his family physician, David Johnson, M.D., for follow up. Dr. Johnson treated claimant for several weeks and then referred him to Dr. Lehman for additional workup. At that point in time, the insurance carrier then referred claimant to a neurologist, Dr. Weinstein. Dr. Weinstein referred claimant to Melvin Karges, M.D., for physical therapy.

In addition to the physicians mentioned above, Bernard M. Abrams, M.D., P. Brent Koprivica, M.D., and Robert M. Beatty, M.D., have also examined and evaluated claimant to determine the nature and extent of injuries he sustained in the October 1993 accident.

At the time of regular hearing, claimant was neither working nor looking for work. He testified he had been unable to complete the work hardening program prescribed by Dr. Karges and had been placed in a full-leg brace. Claimant also testified he presently experiences, among other problems, muscle spasms primarily in his right leg and to a lesser extent in his right arm, that he has great difficulty walking or climbing stairs and that he now uses both a long-leg brace and cane to walk. He also testified he has a marked loss of control and coordination of his right arm and leg. Other complaints include pain and a catching sensation in the neck, and pain in the right arm, hip and right leg. Claimant contends he is permanently, totally disabled.

Claimant presented the testimony of Dr. Karges who is board certified in physical medicine rehabilitation. Dr. Karges treated claimant between March and August 1994, prescribing medication, therapy and ultimately a long-leg brace. Based upon a consistent pattern of weakness and coordination, this doctor believes claimant has some spinal cord dysfunction as a result of the October 11, 1993 electrical accident. The doctor explained his diagnosis of spinocerebellar tract dysfunction as follows:

"The spinocerebellar tract is a pathway from the peripheral nerve, either in the leg or in the arm, to the cerebellum, which is the balance and motor control center in the base of the brain, and it is a pathway within the spinal cord that goes into the entire length that can be damaged at any level throughout the length; and it was my opinion, after the course of his care, that somewhere through that pathway there was, at least, some minor degree of problem that was affecting his balance, his coordination, and his tone."

Dr. Karges believes it would be difficult, or less than obvious, for a neurosurgeon to identify and make the same diagnosis. Although he released claimant from treatment in August 1994, the doctor continues to prescribe medication for nerve injury pain and for spasticity and also continues to prescribe the long-leg brace to prevent inversion of the right foot. Dr. Karges last saw claimant in December 1994. At that time claimant's examination was relatively unchanged and the doctor's clinical impression remained unchanged that claimant had right upper and lower motor incoordination.

In light of a functional capacity evaluation he had ordered, Dr. Karges believes claimant could not perform jobs listed in either the medium or light physical labor categories as defined by the Dictionary of Occupational Titles. He also believes claimant's residual functional capacity is limited to sedentary activity requiring neither bilateral hand coordination nor right hand speed. Finally, Dr. Karges believes claimant has a 28 to 40 percent whole body functional impairment due to the electrical accident consisting of 20 to 25 percent impairment for gait impairment, 5 to 10 percent impairment to the right upper extremity, and 5 to 10 percent impairment for sexual difficulties. He believes claimant requires retraining before he would be able to perform any work other than very menial sedentary tasks. He also believes claimant has some reactive depression or difficulty dealing with his pain and function, although it was not to the degree it significantly interfered with his progress.

Claimant also presented the testimony of Dr. P. Brent Koprivica who saw claimant at his attorney's request in August 1994. Dr. Koprivica is board certified in emergency medicine and is currently working on a master's degree to become board certified in occupational medicine. Dr. Koprivica diagnosed a central electrocution injury with spinal cerebral tract dysfunction which he describes as injury to the brain and spinal cord manifested by neurologic damage and problems with claimant's gait and right upper extremity. He believes claimant is sustaining additional injury to his knee and ankle joints because of the altered gait and that claimant has a post-traumatic stress problem as a result of his physical injuries.

Dr. Koprivica believes claimant is limited to sedentary left-handed activities as he is presently restricted from standing, walking, climbing and is limited to occasionally lifting up to ten pounds. Although Dr. Koprivica generally agrees with the results of the functional capacity evaluation ordered by Dr. Karges, he also believes claimant is permanently, totally disabled and has sustained, based upon the AMA Guides, a 72 percent whole person functional impairment due to the October 1993 accident. This doctor also believes claimant's prognosis is poor and feels claimant's lower extremity dysfunction will increase due to the ankle, knee and hip, depending upon how often claimant is on his feet. The doctor is concerned claimant has not had evaluation to determine if there is a psychological component to his condition.

Respondent presented the testimony of board-certified neurologist Bernard M. Abrams, M.D., who also examined claimant in August 1994 at his attorney's request. Dr. Abrams found some of claimant's complaints inconsistent with the clinical findings and, therefore, thought claimant's complaints were emotionally determined. However, he did not find any evidence that claimant was malingering. In his deposition, the doctor explained:

"I thought that his complaints were emotionally determined. That is, that they were a result of his electrocution, but the result was really on his psyche rather than his body, and I thought that that problem should be addressed."

"Sometimes there is a functional impairment that is organic, but it's so buried under the psychological impairment that you really can't tell."

"At the time that I saw him, I thought the major part of his problem or his impairment was psychiatric, but that didn't mean there was not some underlying physical problem, although I wasn't able to discern exactly how

much of it was physical. I thought the majority was emotional, but I certainly in fairness to Mr. McVay would reevaluate him after he'd seen a psychiatrist."

Although he was unable to apportion between the physical impairment and the psychological, Dr. Abrams did testify that claimant was totally disabled as a result of the electrical shock, unable to engage in substantial and gainful employment, and in need of psychiatric treatment. This doctor believes claimant sustained a hysterical conversion reaction as a result of his accident.

Respondent also presented the testimony of board-certified neurosurgeon Robert M. Beatty, M.D., who examined claimant in November 1994 at the Administrative Law Judge's request for an independent medical evaluation. Dr. Beatty did not find any evidence of radiculopathy or dysfunction of the nerve roots or spinal cord and, therefore, did not find any physical impairment. However, he believes claimant is experiencing a psychological reaction to the electrical shock which he identifies as a normal sequela. Dr. Beatty also generally feels the functional evaluation assessment ordered by Dr. Karges is a reasonable assessment of claimant's disabilities. He also believes claimant should be seen by a psychologist or psychiatrist and that it would be best for that professional to comment upon claimant's limitations and abilities.

Based upon the medical testimony presented, coupled with the testimony of claimant, the Appeals Board finds claimant has established he is totally disabled from engaging in any substantial or gainful employment. Whether claimant's disability is due to physical injury or psychological impairment is of no consequence at this point in time because all four doctors who testified indicate claimant's disability is real and work related. Although it is possible that claimant's condition may improve with appropriate psychological or psychiatric treatment, claimant is presently entitled to permanent, total disability benefits subject, of course, to review and modification upon proper application if and when there is a change in claimant's circumstances or abilities.

The Appeals Board adopts the findings and conclusions of the Administrative Law Judge to the extent they are not inconsistent with the findings made herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated June 30, 1995 should be, and hereby is, modified to award claimant permanent total disability benefits.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Bobby J. McVay, and against the respondent, K & W Underground, and its insurance carrier, Insurance Company of North America, for an accidental injury which occurred October 11, 1993. Based upon an average weekly wage of \$293.54 claimant is entitled to 46 weeks of temporary total disability compensation at the rate of \$195.70 per week or \$9,002.20, followed by 592.74 weeks at the rate of \$195.70 per week or \$115,997.80 for a permanent total disability making a total award of \$125,000.00.

As of May 14, 1996, there is due and owing claimant 46 weeks of temporary total disability compensation at the rate of \$195.70 per week or \$9,002.20, followed by 89.14 weeks of permanent total disability compensation at the rate of \$195.70 per week in the

sum of \$17,444.70, for a total of \$26,446.90 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance is to be paid at the rate of \$195.70 per week, until fully paid or further order of the Director.

Future medical benefits may be granted upon proper application and approval by the Director.

The remaining orders of the Administrative Law Judge are adopted by the Appeals Board and incorporated herein by reference as if fully set forth to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of June 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Daniel L. Smith, Overland Park, KS
Marcia L. Yates, Kansas City, MO
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director